

Before the
Federal Communications Commission
Washington, D.C. 20554

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FCC Mail Room

In the Matter of)	
)	
Acceleration of Broadband Deployment by)	WT Docket No. 13-238
Improving Wireless Facilities Siting Policies)	
)	
Acceleration of Broadband Deployment:)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	
)	
Amendment of Parts 1 and 17 of the)	RM-11688 (terminated)
Commission's Rules Regarding Public)	
Notice Procedures for Processing Antenna)	
Structure Registration Applications for)	
Certain Temporary Towers)	
)	
2012 Biennial Review of)	WT Docket No. 13-32
Telecommunications Regulations)	

**COMMENTS FILED BY CITY OF SAN MARCOS, CALIFORNIA REGARDING THE FCC'S
NOTICE OF PROPOSED RULEMAKING**

Comment Date: FEBRUARY 27, 2014

Jack Griffin, City Manager

1 Civic Center Drive,
San Marcos, CA 92069

P: (760) 744-1050

F: (760) 744-9520

INTRODUCTION

The City of San Marcos, California offers these comments in response to the Federal Communications Commission's (FCC) Notice of Proposed Rulemaking (NPRM) adopted and released on September 26, 2013.

Located 40 miles north of downtown San Diego in the foothills of northern San Diego County, the City of San Marcos has been one of the fastest growing cities in the region. Between the years 1980 and 1990, San Marcos more than doubled its population and the City is now home to nearly 85,000 residents across 25 square miles. Regional access to the City is provided by State Route 78, an east/west highway that links Interstate 5 with Interstate 15. Known as North County's educational hub, San Marcos

is also home to major educational institutions like California State University, San Marcos, Palomar College and the San Marcos Unified School District and several other higher education institutes that collectively serve more than 60,000 students. The City's key industry clusters include specialized manufacturing, biomedical devices and products, biotechnology and pharmaceuticals and information and communications technology.

San Marcos supports the thoughtful, detailed comments filed by the many municipal commenters (such as the City of Mesa, San Antonio, City of Alexandria, City of Eugene and those of the national municipal organizations like the League of California Cities) in this proceeding. Such comments address a wide range of issues and problems with Section 6409(a) and the Rule. San Marcos opposes the comments filed by the industry, such as PCIA, CTIA, Verizon, AT&T, among others.

Beginning in the 1980's, the City of San Marcos began permitting wireless telecommunication facilities. As the technology has advanced, so has the City's wireless infrastructure. Most notably, in the last three years, the wireless telecommunication facility operators in San Marcos have been replacing smaller antennas with new larger 6' to 8' antennas. Since the City does not regulate the technological capabilities of this equipment, beyond compliance with FCC regulations for RF emissions, little is known by the City of the capabilities of this equipment (i.e. to provide wireless broadband connectivity). To the best of our knowledge, the following eight companies own wireless telecommunication facilities within San Marcos and provide service: AT&T, T-Mobile, Verizon, Cricket, Sprint, Nextel, Crown Castle and TowerCo.

In San Marcos, most wireless telecommunication facilities have been constructed at a height of between 25 to 35 feet. In general, co-location on one of these facilities would place the colocated antennas at heights of between 20 to 12 feet. The service providers have given feedback to the City that such a low facility would not provide the coverage to address the service gap issue. As a result, colocation in the City is primarily done horizontally with additional wireless telecommunication facilities on the same site or additional antennas mounted at identical heights on existing buildings. Both examples given for "horizontal co-location" are treated as "new applications" and do not benefit from the rights provided by the Middle Class Tax Relief and Job Creation Act of 2012. In general, since the colocations are "new applications," the City processes these applications consistent with the provisions of the shot clock rule and PSA. Ninety days is *not* a sufficient amount of time to process an application. When the shot clock rule is violated by the City, more often than not, wireless telecommunication facility applicants will work with the City to complete processing of the application in lieu of legal recourse or tolling agreements.

IMPLEMENTATION OF SECTION 6409(a)

In its brief existence, Section 6409(a) appears to facilitate *de minimis* changes to legally established wireless facilities without much controversy. A diligent search revealed that only three cases even address the statute. The Commission should therefore find, at least at this early stage, that it should neither interpret the terms in Section 6409(a) nor adopt any related mandatory rules.

In the event that the Commission determines that it should exercise its regulatory authority with respect to Section 6409(a), San Marcos counsels the Commission to (1) narrowly interpret the statutory terms to afford them the narrow and common definition that Congress intended; (2) affirm the primacy of local authorities to define a "substantial" change; (3) bear in mind that the statute mandates a specific result without any reference to any specific process; (4) acknowledge local courts as the most appropriate and efficient means to resolve wireless land use disputes; and (5) consider the federalism and Tenth

Amendment limits on federal power over the States and their political subdivisions.

Additionally, although Section 6409(a) contains few words and virtually no legislative history, the Commission should not view it as a blank slate. Congress enacted Section 6409(a) within the context of the Telecommunications Act of 1996 ("Telecom Act"), and the Commission should interpret any new rules to govern Section 6409(a) in manner consistent with the policies, objectives, history, and well-developed case law connected with the Telecom Act. Section 6409(a) exists as a very narrow exception the rule of local authority explicitly reserved in the Telecom Act, and the Commission should not interpret the statute so broadly that the exception swallows the rule.

While service providers do not typically colocate on existing facilities in the San Marcos, the City currently uses a tiered system of permits that provide streamlined and ministerial approval processes for the least intrusive wireless telecommunication facility design (i.e. stealthed or concealed facilities not located in residentially zoned areas). For facilities that do not meet this criteria, a traditional discretionary permit is required (i.e. CUP). This tiered system creates an incentive for wireless telecommunication facility operators to propose the lowest impact facility in the least controversial location (not in residentially zoned areas of the City). In general, this system is well received by both the public and the wireless telecommunication facility operators; however it does not function without incident.

Residents in San Marcos receive public notification of a project for a wireless telecommunication facility when it is proposed at a site that requires a discretionary permit. As a result, these sites are often controversial. Most of the comments the City receives are related to Radio Frequency (RF) Radiation. The City has an extensive review process that requires the submittal of RF emissions modeling, independent review of the modeling to confirm compliance with FCC regulations and the submittal of a compliance report with field measurements within six months of becoming operational. Once this process is explained to residents, most of their concerns about RF emissions are addressed. On occasion, the City does receive an application for a facility with a design that is unacceptable. City staff is generally able to work with applicants to resolve these issues and either modify the project design, or find a suitable alternative site. On the rare occasion that the City receives a complaint from the public about the maintenance of a facility, these are addressed and corrected through the Notice of Violation - Cure Period approach of code enforcement. Maintenance issues are addressed at the time the wireless telecommunication facility operators pull building permits for antenna upgrades, which occurs about every five years. In the rare event that resolution is not found for citizen complaints, these issues have gone through civil litigation before the superior court, as was the situation with one horizontal colocation application processed by the City.

As cities and industry continue to successfully evolve best practices together and work towards streamlining the process for the collocation of, removal of and replacement of wireless transmission equipment, it is premature for the Commission to adopt narrow definitions for the terms in Section 6409 (a). Municipalities must retain the autonomy to determine specific process and because resident complaints are minimal and often resolved at a local level, local courts are the most appropriate and efficient means to resolve wireless land use disputes in San Marcos.

IMPLEMENTATION OF SECTION 332(c)(7)

The Commission also seeks comment on whether to modify its *2009 Declaratory Ruling* that interprets the term "reasonable time" as used in Section 332(c)(7)(B). For the most part, State and local

governments adapted well to the *2009 Declaratory Ruling*, and no factual record before the Commission provides a basis for change. The City of San Marcos recommends that the Commission should not adopt any new rules.

In the event that the Commission determines that it should exercise its regulatory authority with respect to Section 332(c)(7)(B), the City of San Marcos advises the Commission carefully preserve local control over and flexibility in the permit process to encourage government, industry, and community stakeholders to cooperate towards creative wireless solutions. Any finally-adopted rules must preserve enough local authority to bring wireless applicants to the negotiating table.

CONCLUSION

The City of San Marcos would like to thank the Commission for its efforts to better understand the practices and policies surrounding cities' management of public rights of way and the practices currently used to collocate wireless facilities. San Marcos strongly encourages the Commission to consider these comments, as well as those submitted by all cities, before taking any action that may adversely affect the rights of way authority of cities. The Commission has explicitly acknowledged that it does not intend to become a national zoning board, but the practical impact of the Draft Rules will likely result in that very outcome.

Respectfully submitted,
City of San Marcos

By: Jack Griffin, City Manager
1 Civic Center Drive
San Marcos, CA 92069